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*by* I Wayan Wesna Astara

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# The Principle of good items as a legal protection instrument of food and beverage brand holders in Indonesia

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**Abstract.** Plagiarism in the field of food and beverage brands often occurs in Indonesia regardless of health standards. For that Indonesian government to arrange a lawsuit cancellation of brand rights through the good faith principle. From these issues, the issue to be discussed is the regulation and the application of good faith principle as the legal protection instrument of the right holder of food and beverage brands in Indonesia. The purpose of this study is the discovery of a clear interpretation of the principle of good faith as regulated in the rule of law on brand rights in Indonesia. To answer the problem then this research used method of juridical-normative research with the approach of concept and legislation. The outcome of this research will have an impact on the consideration of the renewal of legal arrangements, especially on the principle of good faith as not to cause ambiguity in the rules and its application.

## 1. Introduction

Food and drink (food) is a vital area in the sustainability of a country. This is because the community as one of the elements of the state humanely requires eating and drinking to maintain life and improve welfare. Community welfare is certainly the goal of a country including Indonesia. To ensure that people get healthy food and drinks and meet health quality standards, the Indonesian government issues rules on brand rights. Brand rights are used to more easily control the circulation of food and beverages in the community. Likewise, to find out the presence of food and beverages that do not meet health standards through registered or not the product brand. In regulating brand rights there is the term "good faith principle". The principle of good faith is obliged to be in the registration of food and beverage brand rights or as a proposition in the lawsuit of cancellation of certain food and beverage brands in Indonesia. Starting from the above-mentioned issues, the problem to be studied in depth in this paper is how to regulate and implement the principle of good faith as an instrument of legal protection for food and beverage brand rights holders in Indonesia? the selection of these problems is certainly inseparable from the objectives to be achieved through this paper, namely the creation of legal certainty in the interpretation of the concept of "good faith principles" to be used at the level of rules and practices.

In order to answer the problems as mentioned above, this paper uses juridical-normative research methods. Normative juridical research can be understood as a legal research that focuses on the discussion of legal arrangements. In this context, the rule of law in question is the rule of law regarding the "principle of good faith" in the field of food and beverage brand rights in Indonesia. Likewise, the approach used is the approach of legislation (statue approach) and the conceptual approach (concept approach). The legal materials needed will be obtained from primary legal materials, namely books, as well as secondary legal materials based on laws and regulations, all of which are obtained through



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literature review methods. Legal material obtained is then collected to be sorted and then reviewed by the above detectors. the next step is to present in the descriptive and systematic form.

## 2. Materials and Methods

The research used qualitative methods as such juridical-normative research with an approach of concept and legislation. The data collected by observation and review literature of brand of the food and beverage regulation that published by industry. In line with the problems, objectives and research methods mentioned above, the results of this study are expected to have a significant impact on the community.

## 3. Results and Discussion

### 3.1. Urgency of legal protection for brand holders in the food and beverage sector in Indonesia

The development of human life cannot be separated from various activities both personally and collectively. Without denying the nature of human beings as living beings, all forms of human activity need energy. Energy can be obtained from food sources available in the world. It can be directly stated that all living things including humans need energy from outside their body, one of them is eating and drinking. To create a prosperous society, the fields that cannot be considered are food and drinks (food). The State of Indonesia is striving to do this by issuing legal regulations concerning food in the form of Law No. 18 of 2012 concerning Food (Food Law). In the general explanation, the law is explained as follows: "Food is the basic human need and the fulfilment is a part of the basic rights of every Indonesian. Food must always be available in a sufficient, safe, quality, nutritious and diverse manner at prices affordable by the purchasing power of the people, and not against the religion, beliefs, and culture of the community. To achieve all that, it is necessary to establish a Food system that provides protection, both for those who produce and those who consume food. Food Organization is carried out to fulfill basic human needs that provide benefits in a fair, equitable and sustainable manner based on Food Sovereignty, Food Independence, and Food Security.

The explanation is certainly a strong consideration for the regulation of food and beverages in the form of the Food Law in Indonesia. In line with that, in Law No. 36 of 2009 concerning Health is also regulated that Health is a human right and one of the elements of welfare that must be realized in accordance with the ideals of the Indonesian people as intended in the Pancasila and the opening of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Therefore, every activity and effort to improve the highest level of public health is carried out based on the principle of non-discrimination, participatory, protection, and sustainable which is very important for the formation of Indonesian human resources, increasing national security and competitiveness, and national development. Therefore the regulation of food and beverages in the form of food and beverage brand rights in Indonesia must be endeavoured by the Indonesian government in order to realize the national development goals, which in turn realize the ideals of the Indonesian nation as mandated by the 1945 Constitution of the Republic of Indonesia. As a derivation of the mandate of the 1945 Constitution of the Republic of Indonesia, the protection of the community against the quality of food and beverages that will be consumed by the public to always meet the quality of health, the brand rights are regulated for food and beverage businesses in Indonesia.

The arrangement of brand rights for food and beverage businesses in Indonesia is certainly not without reason. Business actors to be able to register their brands must go through several stages of content testing and quality tests conducted by the government. In the sense that the quality and content of the food and beverage products have met the standards, it is not harmful when consumed by the public. Therefore, regarding the trademark rights and brand rights holders are generally regulated in Law No. 20 of 2016 concerning Brands. It is understandable that the registration of a food or beverage product in Indonesia must go through certain mechanisms as well as the registration must be in good faith. Therefore, it can be minimized plagiarism efforts or efforts to resemble certain food and beverage products that have been registered with brands that are very likely to occur in the business world with economic goals alone. Products from business actors that intend to resemble or duplicate brands without the permission of the brand holder certainly cannot be ascertained the quality and content of their products in terms of health. Then in the application for registration of a trademark or in filing a lawsuit

against a registered trademark, the principle of "good faith" must be used. The next section will discuss "principle of good faith" especially in the lawsuit for cancellation of registered food and beverage brands in Indonesia.

### 3.2. Good Faith Principles in Legal Arrangement of Brands in the Field of Food and Beverages

The term "bad faith" is found in Law No. 20 of 2016 in the case of registering an application for registration of a mark and in a lawsuit for cancellation of a registered trademark. Bad faith is a phrase consisting of three words: "intention", "no", and "good". Etymologically, the meaning of each word includes: (1) "Faith", It's means a determination, a firm will; beliefs, beliefs. (2) "No", It means that the parties to express denial, rejection, denial, etc. (3) "Good", It means a lok; a worth it; a regular, a lucky; the profitable; the useful; an efficacious; it evil behavior, a manners, a decent, etc.); the honest; the healed; the recovered; survived (nothing less); a properly; a duly; (to state) either; yes (to agree), the goodness [1].

A firm will, belief or belief in the word "intention" is abstract so that it can only be seen from a series of actions. Whereas both in this context lead to the meaning of not being evil, kind or honest. The word "good" in the context of civil law can be interpreted as an act that is not against the law. At BW Article 1365 contains the following rules of violation of the law: "Every act against the law which therefore causes harm to others obliges people who because of their mistakes cause the loss to compensate" [1]. Not directly disclosed the meaning of unlawful acts but can be interpreted that acts against the law are actions that cause harm to others and are accounted for by compensation. Likewise, [2] revealed acts against the law as acts that resulted in a shock in the balance of the public balance. The understanding of Wirjono Prodjodikoro seems broader, but what is termed "the shock in the balance of the balance of society" in the concrete form of loss for others. If grammatically interpreted the term faith is not good found in the explanation of Article 21 paragraph (3) as follows:

"What is meant by an" unwilling applicant "is that the applicant who is reasonably suspected in registering his trademark has the intention to imitate, copy, or follow the brand of another party in the interest of his business to create unfair business competition conditions, deceive, or mislead consumers". Referring to the explanation there are several indicators to be said to be "bad faith" including a. Intention to imitate; b. Intention to copy; c. Following the other party's brand for the sake of its business with the aim of creating unfair business competition, deceiving or misleading consumers.

It can be noted that "bad faith" is subjective, in the sense that all actions are based on the intention of the defendant (the maker), in which the invention is a negative intention or against the law. The regulation of Article 21 regarding bad faith takes the form of a negative provision (negative list). In positive thinking, everyone who wants to register a mark must register their brand with "good faith". Seeing the official explanation of Law No. 20 of 2016 can be noted that the purpose of setting up this arrangement is to provide recognition and protection of the results of imagination and human intellectuals and avoid cheating in business activities. So, it can be interpreted systematically that the terms good faith are also contained in Article 1338 paragraph (3) of the Civil Code which reads: "the agreement must be carried out in good faith". Salim revealed that good faith can be divided into relative goodwill and absolute good faith. Relative good faith paid attention to the attitudes and behaviors that are real to someone. Whereas absolute goodwill, the judge lies in common sense and justice, an objective measure is made to assess the state (impartial judgment) according to objective norms. If re-referring to the explanation of Article 21 paragraph (3) then the provisions of bad faith in Law No. 20 of 2016 adopts absolute goodwill by determining a criterion as an objective measure to assess the bad faith of the applicant for brand rights.

Taking into account the formulation of an explanation that uses the conjunction "or" it can be seen that the provisions of bad faith require several types of actions that can be categorized as bad faith alternatively. In the sense that the applicant can say the right to have "bad faith" is enough to meet at least one of the three criteria. The three indicators of "bad faith" are a form of intention so that it needs to be proven through a process of proof in court. Provisions in Law No. 20 of 2016 and the explanation does not provide a further understanding of the concrete form of an act to be categorized as imitating, copying or following intentions with the aim of violating the law. A law and regulation as regulated in Law No. 12 of 2011 concerning the Establishment of Legislation Article 5 letter "f" must fulfil the



principle of "clarity of formulation". Related to this, Jeremy Bentham in Yuliandri revealed that there were imperfections in the formation of legislation, in which the imperfection was divided into two degrees. First-degree imperfection is due to the following: (1) Dual meaning (ambiguity); (2) Blur (obscurity); (overbulking) [3], [4].

Unclear / obscurity the term "bad faith" in the regulation No. 20 of 2016 is a juridical problematic implication of raising its own problems at the philosophical and sociological level in realizing justice, especially in the dispute of brand rights in Indonesia. In connection with the arrangement of the Claims for Cancellation of Registered Brands due to bad faith of the registered brand owner, Article 77 of Law No. 20 of 2016 is arranged as follows: (1) Claims for cancellation of Trademark registration can only be submitted within 5 (five) years from the date of registration of the Trademark. (2) A lawsuit for cancellation can be submitted indefinitely if there is an element of bad faith and/or the mark in question contradicts the state ideology, legislation, morality, religion, morality, and public order.

The article is further assessed that the provisions in paragraph (2) are exceptions to the provisions of article (1). The provisions of paragraph (2) provide an unlimited opportunity for filing a lawsuit for cancellation of brand registration, meaning that at any time the brand holder may be sued for the cancellation of the mark by another party. Whereas systematically in Article 21 paragraph (3) the same Act has been selected for the registration of a trademark, in which the minister will refuse if the registration contains elements of bad faith. Gustaf Radbruch revealed the purpose of a law is not only justice but certainty and benefit. A deconstruction of the regulation should be carried out regarding the time period for filing a lawsuit for cancellation of registration of a registered trademark in bad faith so that justice and legal certainty can be realized in the arrangement of the brand.

### 10 3.3. Application of Good Faith Principles in Legal Protection of the Right to Food and Beverage Brands

As previously exposed that in Law No. 20 of 2016 stipulates that the element of "bad faith" is an indicator of the cancellation of ownership of trademark rights of goods and / services in Indonesia, including the right to brand food and beverages. The cancellation of certain food and beverage brand rights in Indonesia must, of course, go through a court mechanism, which can be seen that the existence of the principle of good faith must be proven as a proposition in the evidence at the trial. The interested party and the owner of the unregistered food and beverage brand can file a lawsuit for the registration of the food and beverage brand in case there is an element of bad faith from the registrar of the food and beverage brand. Article 76 paragraph (3) is regulated as follows: "the cancellation claim is submitted to the Commercial court against the registered brand owner". The estuary of the dispute over the registration of the food and beverage brand is the commercial court. This is reinforced by the expansion of the competence of the commercial court under Article 300 of Law No. 34 of 2004 concerning Bankruptcy and Postponement of Obligations to Pay Debt (hereinafter referred to as Law 34 of 2004). Therefore, the commercial court in deciding disputes in the field of brand rights uses the civil procedure law as stipulated in Article 299 of Law 34 of 2004 that: "Unless otherwise stipulated in this Law, the applicable procedural law is the Civil Procedure Law." In this section, the procedural law which is the main study is proof of the element of "bad faith" in the lawsuit of registration of registered trademarks.

Civil procedural law is a reference for commercial courts in deciding on disputes over intellectual property (brand) rights in case of a lawsuit against food and beverage brand rights holders in Indonesia. A priori, before the judge decides the claim for cancellation of the food and beverage brand, especially the principle of bad faith in the registration of the mark, it is necessary to prove the process of adopting civil procedure law. The term proof comes from the word "proof" which is equated with "evidence" (English).[5]'[6] "Evidence" in the Black's Law Dictionary is defined as follows: "(1) something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact, 2 the collective mass of thing, (3) The body of law regulates the admission of what is inferred as proof into the record of legal proceedings. (something (including testimonies, documents, and tangible objects) that tend to prove or deny the existence of suspected facts, collective body mass, legal entities that regulate the receipt of what is considered as evidence into legal proceedings). According to [7], it proves to contain several meanings, namely: (1) Proving in a logical sense, means giving absolute certainty, because it applies to everyone and does not allow the existence of evidence of

the opponent; (2) Proving in a conventional sense, means giving certainty but not absolute certainty but relative certainty of its nature which has the following levels: a. The certainty that is only based on feelings, so it is intuitive and is called time conviction. b. Certainty based on reasoning so-called conviction reason. c. Proving in a juridical sense (in civil procedural law), nothing else means giving the judges sufficient grounds to examine the case in order to provide certainty about the truth of the event submitted.

Evidence-based on a civil event cannot be separated from the role of evidence, which according to the provisions of article 164 HIR there are five pieces of evidence in a civil case, namely: (1) written evidence; (2) witness evidence; (3) proofing equipment; (4). proof of recognition; (5) oath proof. [8] revealed that the order of evidence shows their respective strengths, the evidence that has the strongest evidentiary power is written evidence or written evidence. The five pieces of evidence are pillars in deciding civil disputes, in this case, the lawsuit for cancellation of registered brands, considering the characteristics of civil procedural law place the judge in a passive position. In the sense that the disputing party who actively proves his argument that the registered trademark contains elements of bad faith, in this case, it is a collector (the principle of incumbent probation acts that postulates which prove). This is commonly known as Positif Wettelijk Bewijstheorie, therefore civil events are oriented towards finding formal truth. The flow of thinking is, that the judge's decision is only fixated on the legal evidence presented during the trial by the parties to the dispute. Intent to imitate, intention to copy or intention to follow as an indicator of "bad faith" which is all intention (in thought).

#### 4. Conclusion

In essence, the arrangement of the "good faith principle" in the field of brand rights aims to provide quality protection for the community and legal protection for the brand holder in this case food and drink in Indonesia. Good faith principles as stipulated in Law No. 20 of 2016 concerning Brands creates ambiguity which causes legal uncertainty in its application. It is understandable that the principle of good faith in its regulation is not further regulated in regard to the criteria for distinguishing good faith and bad faith, especially in the field of food and beverage brand rights in Indonesia. As a very logical suggestion for the findings, in the future, the legislature will be the holder of the legislative authority to reform in the field of regulation. primarily is to set the principle criteria not good in the field of brand rights. In this context, the criteria are very important for realizing justice and legal certainty for all parties related to food and beverage brand rights in Indonesia.

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